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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 572

HAROLD MARSHALL COPELAND, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Harold Marshall Copeland, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on October 25, 1961.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not as of this date reported in the official or unofficial reports. The opinion of the United States Court of Appeals for the Fourth Circuit is hereto appended.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on October 25, 1961. Upon application of the petitioner, and for good cause shown, the Court of Appeals on November 3, 1961, ordered that its mandate be stayed pending application of the petitioner in the Supreme Court of the United States for a writ of certiorari to the Court of Appeals. The jurisdiction of this Court is invoked under the provisions of 28 USCA, section 1254(1).

QUESTIONS PRESENTED

1. Did the Trial Court commit prejudicial error in allowing Government's witness Brown to testify over objection that Ralph Woodrow Wilson stated to him that he had contracted with Harold Marshall Copeland to furnish him sugar, this being hearsay evidence, in that the existence of a conspiracy may not be established by the ex parte declaration of an alleged conspirator made in the absence of his alleged co-conspirator? (See transcript, pages 11 and 12).

2. Did the Trial Court commit prejudicial error in allowing Government's witness Brown to testify over objection that Armstead Sharp stated to him that Harold Marshall Copeland was probably at the still or out gathering sugar, this being hearsay evi-

dence and there being at the time no independent evidence of the existence of a conspiracy between Harold Marshall Copeland and Armstead Sharp and in that the evidence of a conspiracy may not be established by the ex parte declaration of an alleged conspirator made in the absence of his alleged co-conspirator? (See transcript, pages 47 and 48).

STATUTE INVOLVED

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both." Title 18, USCA, Chapter 19, Section 371.

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Petitioner was convicted of a conspiracy to violate the Internal Revenue Laws relating to distilled spirits and sentenced by the Court to imprisonment for a period of 40 months. The petitioner contends that the Trial Judge committed prejudicial error in admitting in evidence two statements which were offered to prove a conspiracy. The statements are set forth herein below verbatim.

Statement No. 1. On pages 11 and 12 of the transcript, the following appears, the Government's attorney examining witness Brown:

> "Q. Now, going back before we go any further, October 5, I wish you would just tell what con-

versation you had there with Ralph Wilson, and what he instructed you to do, and who to see.

A. There at the apartment—

Mr. Greene: Objection. He has been over that.

The Court: Objection overruled.

A. (Continuing) There at the apartment at Danville, Virginia, 608 Hughes Street, on the morning of the 5th of October when Ralph Wilson came to the apartment, there in the presence of myself, and Rooster Miller, Mr. Ralph Woodrow Wilson stated he had been to see Harold Copeland—

Mr. Greene: Objection.

The Witness: —and Bud White.

Mr. Greene: Objection to this as to defendants Copeland and White.

The Court: Objection overruled.

The Witness: He stated he had been to see these two men, and he had contracted with them to furnish them sugar.

Q. (By Mr. Holshouser) Which two men now, who are you talking about?

A. Mr. Wilson stated he had contacted Harold Copeland and Bud White.

Q. All right.

A. And he had an agreement with them to furnish them sugar at $12 per hundred pound bag, and jars at cost, and in return he would receive whiskey at $20 a case; that would be $6 to a case."

Statement No. 2. On pages 47 and 48 of the transcript the following appears, the Government's attorney examining the witness Brown:

"I went to the Copeland residence, and Copeland was not there; and so I went on out to the Armstead Sharp residence, which is about one mile south of Highway Number 158, and it is the second house south of the Mt. Moriah Church in Hertford County. It is about three miles west of Winton on state route number 1174.

"I went to this residence, and upon arriving there, I talked to Armstead Sharp. He came out of the house and got into my car; I asked him if he had seen Mr. White or Mr. Copeland; and Armstead Sharp is the gentleman sitting over there, and I asked him if he had seen Mr. White or Mr. Copeland, if he knew where they could be found.

"Mr. Greene: Objection.

"The Court: Objection overruled.

"The Witness: Armstead stated he didn't know exactly where they were at the time, but they had been there earlier at his residence on this day, and he stated that they were probably at the still or out gathering sugar.

"Mr. Green: Object to that.

"The Court: Objection overruled."

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Petitioner was indicted for alleged violation of the conspiracy statute hereinbefore quoted, to wit, 18 USCA, Chapter 19, Section 371.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

At the time this testimony was elicited from witness Brown there was no independent evidence of the existence of a conspiracy between petitioner and Ralph Woodrow Wilson and there is no evidence of the existence of a conspiracy on October 5, 1960, the date to which the testimony relates, and there was no independent evidence of the existence of a conspiracy between petitioner and Armstead Sharp when the recited testimony was elicited from witness Brown.

In *Bartlett et al.* v. *United States*, Tenth Circuit, 166 Fed. 2d 920, at page 924, the following appears:

"However, to render evidence of the acts or declarations of an alleged conspirator admissible

against an alleged co-conspirator, the existence of the conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators, done or made in his absence. The acts or declarations of a conspirator, prior to the formation of the conspiracy or after its termination are not admissible against his co-conspirators."

The same principle of law is enunciated by Judge Learned Hand in *United States* v. *Nardone et al.* (Second Circuit) 106 Fed. 2d 41, at page 42.

In *May and Garson* v. *United States* (U. S. Court of Appeals of D. C.) 175 Fed. 2d 994, at pages 1007 and 1008, it is said:

> "The rules are that one defendant's connection with a conspiracy cannot be established by the acts or declarations of other defendants in his absence, and that a defendant cannot be bound by the acts or declarations of other defendants until (a) the conspiracy has been established and (b) the defendant's participation in the conspiracy has been established."

Also, see *Hauger* v. *U. S.* (W. Va. 1909) 173 Fed. 54, where it was held that the declarations of an alleged co-conspirator to a witness were inadmissible to prove the existence of the conspiracy as against another party thereto. In *Mayola* v. *United States* (Ninth Circuit) 71 Fed. 2d 65, at page 67, it is said:

> "There is another reason for the rejection of this testimony. It is held, in Kuhn v. U. S., 26 F. (2d) 463 (C.C.A. 9), that the declarations of one co-conspirator to another are not competent to establish the connection of a third person with the conspiracy. This is followed in Minner v. v. U. S., 57 F. 2d 506, 511 (C.C.A. 10), and again by the same circuit in Thomas v. U. S. (C.C.A.) 57 F. (2d) 1039, 1041. The Circuit Court of Ap-

peals for the Sixth Circuit, in Nibbelink v. U. S., 66 F. (2d) 178, 179 following, but not citing, Pope v. U. S., 289 F. 312, 315 (C.C.A. 3), and Kelton v. U. S., 294 F. 491, 495 (C.C.A. 3), says: '. . . Before the declarations of co-conspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made.' "

CONCLUSION

It is respectfully submitted that the testimony particularized is nothing more than hearsay evidence, and such evidence is not competent to prove the existence of a conspiracy. The first statement recited related to October 5, 1960. The second statement recited related to October 15, 1960. There was no independent evidence of the existence of the conspiracy as of October 5, 1960, and there was no independent evidence of the existence of the conspiracy with Armstead Sharp as of October 15, 1960. It is therefore respectfully petitioned that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8360

UNITED STATES OF AMERICA, *Appellee*,

versus

HAROLD MARSHALL COPELAND, *Appellant*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT DURHAM

EDWIN M. STANLEY, DISTRICT JUDGE

(Argued October 4, 1961. Decided October 25, 1961.)

Before SOPER, BRYAN and BELL, Circuit Judges.

Gerald F. White (Russell E. Twiford and McMullan, Aydlett & White on brief) for Appellant, and Lafayette Williams, United States Attorney, (James E. Holshouser, [former] United States Attorney, and Lafayette Williams [former] Assistant United States Attorney, on brief) for Appellee.

BELL, Circuit Judge:

The appellant was convicted of violating the Internal Revenue laws relating to distilled spirits and sentenced by the Court to imprisonment for a period of forty months. From this judgment he appeals, contending that the Trial Judge committed prejudicial error in admitting in evidence two statements which were offered to prove a conspiracy.

The appellant makes three contentions with respect to this evidence: that the first statement was not introduced in the proper order during the trial in that it was offered prior to introducing independent evidence of the conspiracy; that there was no evidence offered at any time

during the trial tending to prove that a conspiracy existed when the first statement was made; and finally, that both statements were hearsay.

With reference to the first contention, there can be no question but that the order of the reception of evidence lies within the discretion of the Trial Judge, whose action will not be reversed on appeal unless it amounts to a gross abuse of discretion. *United States* v. *Manton*, 107 F (2d) 834, *Braatelien* v. *United States*, 147 F (2d) 888, *Tingle* v. *United States*, 38 F (2d) 573, *Cohen* v. *United States*, 157 F. 651. We find no such abuse here.

The cases relied on by the appellant are not at variance with these principles. Cf. *Hauger* v. *United States*, 173 Fed. 54, from this Circuit, which involved a confession by an alleged conspirator after he had been arrested.

With reference to the second contention, the testimony complained of consisted of two separate statements made by different parties at different times to the government witness Brown. The first was on October 5, 1960, when Brown testified that Wilson, one of the alleged conspirators, told Brown that he had made an agreement with the appellant Copeland and a Mr. White under the terms of which Wilson was to furnish them sugar at $12.00 a bag and jars at cost, and in turn Copeland and White were to furnish Wilson whiskey at $20.00 per case. On October 6th White in person confirmed to Brown the terms of this agreement. On October 8th the appellant Copeland indirectly confirmed the agreement by telling the witness Brown that he needed fruit jars at the still. In October 9th Copeland confirmed to Brown the exact terms of the agreement which were set forth in the statement complained of. On October 11th Copeland delivered to Brown 101 cases of illicit whiskey for which Wilson paid Copeland in Brown's presence. What more direct evidence can be adduced to prove the existence of

the conspiracy which Wilson disclosed to Brown on October 5th? Wilson had previously employed Brown to haul liquor for him and the statement constituted instructions and information to Brown necessary to enable him intelligently to perform his work.

The imparting of this information was in furtherance of the plan or scheme which we find in full operation within forty-eight hours. There was more than enough evidence in the record from which the jury could conclude that the operation had been under way prior to October 5th. This being true, the declarations such as those quoted above of all of the conspirators are a part of the res gestae and, therefore, admissible. *Wiborg* v. *United States*, 163 U. S. 632, 657, 16 S. Ct. 1127, at 1197, 41 L.Ed. 289. Each conspirator is in law a partner and agent of every other member of the conspiracy. *Hitchman Coal & Coke Company* v. *Mitchell*, 245 U. S. 229, 38 S. Ct. 65, 62 L. Ed. 260, L.R.A. 1918C, 497, Ann. Cas. 1918B, 461.

The second statement in question to which the appellant objected was made by Sharp, another of the conspirators, on October 15th. By that date direct evidence showed Copeland deeply involved as a major participant in the illicit operation. When the witness Brown asked Sharp if he had seen Copeland the reply was that Copeland had been at Sharp's place earlier in the day, that he was no longer there, but probably at the still or out gathering sugar. Obviously this statement was not offered to prove that Copeland was at the still or out gathering sugar. As to those facts it was not only hearsay but mere speculation; it did, however, tend to prove that Copeland was participating in the conspiracy as well as Sharp, and it was obviously offered for that purpose. Furthermore the statement, in that it gave information and advice to Brown in the form of an opinion, was clearly in furtherance of the conspiracy. It is obvious, therefore, that both statements were admissible in evidence since they furthered the conspiracy and were made in the process

thereof, nor were they hearsay evidence in the strict sense of the word. In *Murray* v. *United States*, 10 F (2d) 409, the Court, referring to testimony of this type, pointed out that the declarations were not only admissible because in furtherance of the conspiracy but were not hearsay:

> "As already stated the remote hearsay was not hearsay at all. It consisted in statements made by one conspirator to his co-conspirator as inducement and encouragement to go on with the contemplated crime. Such statements were, therefore, in furtherance of the conspiracy, and the fact that they were the quoted statements of others does not make them hearsay. Proof of the fact that a certain statement was made is not hearsay of that fact. It is hearsay of the truth of the statement."

There being no error, the judgment below is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 572

HAROLD MARSHALL COPELAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 66–70; Pet. App. 1a–4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1961 (R. 70). The petition for a writ of certiorari was filed on November 24, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was sufficient evidence, independent of statements made by the conspirators, to show peti-

tioner's participation in the conspiracy, and thus render admissible against him extra-judicial statements by the other conspirators.

STATEMENT

Petitioner and other co-defendants were convicted of a conspiracy to violate the federal tax legislation on distilled spirits (R. 43–46). Petitioner was sentenced to a term of imprisonment of 40 months (R. 1–2). On appeal, the court of appeals affirmed the conviction (R. 70).

The conspiracy was proved primarily through the testimony of Brown, an agent, who worked for the co-defendant Wilson in September and October 1960, when the distillery was seized (R. 3–4). Wilson furnished sugar and fruit jars to petitioner and co-defendant White, who operated the distillery and furnished whiskey to Wilson (R. 10, 14, 24).

1. The independent evidence, other than the statements by co-conspirators, to show petitioner's participation included the following:

On October 8, at a meeting with Wilson, Brown, and others, petitioner said he needed some jars for the still. Brown and another man brought jars in Virginia and delivered them in North Carolina by truck to a place previously designated by petitioner (R. 13–16). Petitioner directed Brown to stay with the truck and then left (R. 17–18). At about 4:00 the next morning, petitioner returned and directed Brown to follow petitioner's car (R. 18–19). The truck was subsequently left in front of a house near the still (R. 19–20, 21). On the trip back in the car, petitioner told Brown that he was "putting out a

little better than a hundred cases a day" (R. 21) and that, so long as Wilson would sell him the sugar at $12 a bag, he would sell the whiskey at $20 a case. Petitioner further stated that, according to their agreement, he would get one-half of the turnout and that Wilson and Brown would get the other half (R. 22).

Brown also testified that on October 16, 1960, in accordance with his arrangement with petitioner, he went to the Sharp residence to get liquor (R. 49). When petitioner failed to show up, Brown went to petitioner's residence in North Carolina where he found the petitioner. Petitioner told Brown that Wilson had not delivered the amount of sugar that he had promised; that petitioner would therefore have to raise the price of the liquor up to $22 a case; but that, if Wilson went back to his original agreement to sell sugar at $12 a bag and the jars at cost, petitioner would lower the price of his liquor to $20 a case (R. 50). During the night of October 17–18, Brown hauled 450 gallons of whiskey, while petitioner acted as a look-out to make sure that they were not being followed (R. 53–55).

2. The trial court admitted, over petitioner's objection, Brown's testimony concerning statements by Wilson and Sharp implicating petitioner in the conspiracy. The first statement concerned petitioner's activities on October 5, 1960. Brown testified that on October 5 Wilson had told Brown that he had seen petitioner and co-conspirator White with respect to furnishing them sugar and that he had an agreement with White and petitioner to furnish them sugar at $12 per 100-pound bag and jars at cost for which

he would receive in return whiskey at $20 a case (R. 9–10).

The second statement concerned the activities of the conspirators on October 15, 1960. Brown testified that, on October 15, Wilson had instructed Brown to go to petitioner's residence and pick up 200 cases of whiskey. When Brown did not find petitioner at home, he went to the home of co-conspirator Sharp. Sharp informed Brown that he did not know where petitioner was, but that petitioner and White had been at his home earlier and were probably at the distillery or out gathering sugar (R. 41–42).

ARGUMENT

1. There was sufficient evidence, without the statements in question, to justify the jury's inference that petitioner was a member of the conspiracy. That evidence consisted of petitioner's own actions and statement to agent Brown which showed that, prior to October 6, 1960, petitioner, together with the other conspirators named in the indictment, was operating the illicit distillery. Thus, there was a firm basis for the application of the well-established rule that declarations of a conspirator are admissible against his co-conspirator, although not made in his presence, provided they were made in furtherance of the objects of the conspiracy. *Krulewitch* v. *United States*, 336 U.S. 440, 443; *Fiswick* v. *United States*, 329 U.S. 211, 217; *Pinkerton* v. *United States*, 328 U.S. 640, 647; *Glasser* v. *United States*, 315 U.S. 60, 74; *Bartlett* v. *United States*, 166 F. 2d 920 (C.A. 10); *United States* v. *von Clemm*, 136 F. 2d 968 (C.A. 2), certiorari

denied, 320 U.S. 769; *Thomas* v. *United States*, 57 F. 2d 1039 (C.A. 10); *Minner* v. *United States*, 57 F. 2d 506, 511 (C.A. 10).

2. Even though the court admitted into evidence the first statement to which Brown testified before petitioner's participation in the conspiracy had been proved by direct evidence, the court committed no error, for the order of proof is discretionary with a trial court. *Glasser* v. *United States*, *supra*, 315 U.S. at 81; *Bartlett* v. *United States*, *supra*, 166 F. 2d at 925. The court admitted the second statement only after there had been considerable evidence showing petitioner's major involvement in the conspiracy.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari should be denied.

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